IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.993 OF 2002

Smt.Luiza w/o Dominic D'Souza ...Appellant

vs.

Municipal Corporation of Greater Bombay and another ...Respondents

Mr.N.V.Moye for the Appellant
Ms Geeta Joglekar for Respondent-B.M.C.

CORAM: A.S.OKA,J.
DATE : MARCH 23,2007.

ORAL JUDGMENT:

1. Heard learned Advocates for the parties. The Appellant-original plaintiff has taken exception to the Judgment and Order dated 28/29th October 2002 passed by the learned Trial Judge in a Notice of Motion for temporary injunction filed by the Appellant. By the impugned order, the learned Trial Judge dismissed the Notice of Motion filed by the Appellant.

2. With a view to appreciate the submissions made by the Advocates appearing for the parties, it will be necessary to refer the facts of the case in brief. The Appellant filed a suit for challenging the action of the first Respondent (first Defendant)-Corporation of issuing two notices dated 20th August 1999 for removing or pulling down the four structures standing on the property of the appellant viz.Plot No.489, TPS

III (Mahim), Gabriel Road, Mahim, Bombay 400014.

3. The first Notice dated 20th August 1999 relates to the alleged unauthorised construction of three patra sheds made up of G.I.Sheets on the compulsory open space of the building in question on its north and east side. It was alleged that the Appellant was carrying out unlawful construction of the three patra sheds. The allegation in the said notice is that the Appellant was unlawfully carrying out erection of three patra sheds.

4. On the same day i.e. on 20th August 1999 another notice was issued alleging that external walls and covering of the roof of shed on plot No.489 has been made up of an inflammable material.

5. In the plaint the contention of the Appellant is that no construction of three patra sheds was being carried out by the Appellant as alleged in the notices issued under section 354-A of the said Act of 1888. In the plaint it is stated that the Appellant is residing in the property known as Ram Wadi which is located on a land bearing old plot no.65 and 66 city survey No.833 and 824 which has been numbered as the final Plot no.489 after the town planning scheme-III (Mahim) came into force.

6. It is asserted that in the year 1948 itself there were three sheds and one Jhawli shed in existence on the said property and sometime in October 1955, the existing Jhawli shed converted in to a structure and thus there were four structures in existence on the suit property. In the plaint a reference has been made to the visit of the Ward Officer in September 1995 to the said property threatening demolition of the structure.

7. The Notice of Motion No.4288 of 1999 was taken out by the Appellant praying for temporary injunction restraining the Respondent from demolishing the said four structures standing on the property on the basis of the notices dated 20th August 1999.

8. The Respondent-Corporation filed an Affidavit in reply. In the Affidavit in reply it is stated that on 19th July 1999 an inspection was carried out on the basis of a complaint made by the members of Ram Saket Cooperative Housing Society Ltd. when it was observed that tarpauline shed with Bamboo was erected in the compulsory open space of the said society. Therefore, a notice under section 349 was issued to the Appellant. It is stated that notice under section 354-A of the said Act was issued in respect of the three patra sheds in the compulsory open space of the building of the said society.

9. There was a rejoinder filed by the Appellant to the said Affidavit-in-reply. In the said rejoinder, the Appellant denied that there was any Tarpauline shed with Bamboo existing on the said plot. The Appellant denied that the shed on the property was made up of an inflammable material.

10. The learned Trial Judge recorded a finding that the Appellant has failed to demonstrate that three sheds were in existence from the year 1948. The learned Trial Judge observed that three sheds have been erected in compulsory open space which were assessed to municipal taxes from 1st April 1999. Perusal of the order shows that the learned Trial Judge has not at all considered the challenge to the notice issued under section 349 of the said Act of 1888. The Advocate for the Appellant submitted that notice under section 354-A was misconceived. He submitted that the alleged shed made up of bamboo and covered by Tarpauline was not in existence when the second notice was issued under section 349 of the said Act of 1888. He stated that all along the case of the Appellant was that the four structures were already in existence from the year 1955. He submitted that the trial Court has not at all considered the scope of section 354-A and section 349 of the said Act of 1888.

11. The learned Advocate for the Respondent No.1 supported the impugned Judgment and Order and pointed out that there is

categorical finding recorded by the trial Court that the Appellant has failed to prima facie establish the existence of structures for a long time. She submitted that the structures were in a compulsory open space and therefore the Appellant is not entitled to discretionary relief. None appeared for the Respondent No.2 though notice is served.

12. I have considered the submissions. The notice under section 354-A of the said Act of 1888 has been issued alleging that the on the date of on which the notice was issued, the Appellant was in the process of constructing the three unauthorised patra sheds made about G.I.Sheets in compulsory open space.

13. The learned trial Judge in paragraph 12 of the impugned Order has recorded a prima face finding that the three sheds have been erected in compulsory open space recently and the three sheds are assessed for municipal taxes from 1st April 1999. Going by the prima facie finding recorded by the learned Trial Judge, at least from 1st April 1999, the said three sheds were in existence. Notice dated 20th August 1999 issued under section 354-A of the said Act of 1888 alleges that at that time the Appellant was carrying on the erection of the three unauthorised sheds. Therefore, going by the finding recorded by the learned Trial Judge, prima facie it appears that the three structures were already in existence at

least on 1st April 1999. Under Section 354-A of the said Act of 1888 a power is vesting in the Commissioner of the respondent No.1-Corporation to stop the erection of the building or work carried out unlawfully. There is a material on record to show that no work was in progress on 20th August 1999 as far as the three sheds are concerned. Prima facie, the notice issued under section 354-A was not legal. If the case of the first Respondent is that the construction has been carried out or the development has been carried out by the Appellant without obtaining prior permission of the authorities, action could have been taken under the relevant provisions of the said Act of 1888 and/or under the Maharashtra Regional Town Planning Act,1966. The learned trial Judge while deciding the Notice of Motion has not at all considered the scope of the power under section 354-A of the said Act of 1888.

14. So far as the legality of the action of issuing notice under section 349 of the said Act of 1888 is concerned, I find that the said issue has not been dealt with in the impugned order. There is no prima facie finding recorded as regards the nature of the material used while constructing the four structures.

15. The suit was filed in the year 1999 and ad-interim relief protecting the suit structures was operating from the year

1999 till the date of the dismissal of the Notice of Motion. Thereafter, during the pendency of this Appeal, the suit structures have been protected by an ad-interim and interim relief granted by this Court. There is no material on record to show that any structure is made up of any inflammable material.

16. Considering the limited scope of the section 354-A of the said Act of 1888, and the fact that the suit the structures were already in existence on the date of issuance of notice, no action could have been taken under the said provision. As stated earlier, the learned Trial Judge has not at all considered the question of applicability of section 354-A and 349 of the said Act of 1888. Considering the what is stated above, this was a case where a prima facie case was made out by the Appellant.

17. Considering the aforesaid factors and considering that ad-interim relief is operating from the year 1999 onwards, the Appeal must succeed. The Appeal must succeed as no action under sections 354-A and 349 of the said Act of 1888 could have been initiated. However, if according to the first Respondent the structures subject matter of the suit are unauthorised, it is always open for the first Respondent to take appropriate legal steps as regards the alleged unauthorised structures in accordance with law.

18. Hence, the Appeal is disposed of by passing the following order :

i) Subject to clarification made above, the impugned order dated 29th October 2002 is quashed and set aside.

ii) Pending the final disposal of the suit, the Respondents are restrained from demolishing or pulling down the suit structures subject matter of both the notices dated 20th August 1999. However, till the final disposal of the suit, even the Appellant will maintain status quo in all respects in respect of the four sheds.

iii) Notice of Motion No.4288 of 1999 stands disposed of in above terms.

iv) Hearing of the suit is expedited.

v) All contentions of the parties in the pending suit are expressly kept open and the Trial Court will decide the suit uninfluenced by the impugned order as well as the observations made in this Judgement.

vi) Grant of temporary injunction will not preclude the first Respondent from taking appropriate proceedings or action in accordance with law as regards the suit

structures.

vii) Appeal is allowed in above terms with no order as to costs.

JUDGE